September 1, 1986. The writ was issued on July 1, 1986 on which date no cause of action for the $500,000.00 existed.

Counsel for the appellants submitted that as unpaid shipbuilders they had a right to retain the vessel and if such right was threatened, they would be entitled to recall credit facilities previously extended to the respondents in the form of the instalment payment terms. According to the appellants, their possessory lien was threatened when the respondents wrongfully took the "Suhaili 5201" out to sea on June 30, 1986, and they therefore withdrew all credit facilities whereupon the $500,000.00 became immediately due despite the contractual provisions. Counsel for the appellants relied on *The Tergeste*[8] at p. 34, *per* Phillimore J.:

"A man who contracts to do a long costly piece of work does not contract, unless he expressly says so, that he will do all the work, standing out of pocket until he is paid at the end. He is entitled to say, 'That is not my contract; it is quite true that I had contracted to do the work and I am bound to do it; but there is an understanding all along that you are to give me from time to time, at reasonable times, payments for work done, and if the contract here was to do certain work, it always included that term, to do it if we are paid reasonable sums in part payment as we go along, not an advance, but in part payment for work already done before we proceed to the next thing'; and if that payment is not made, then the shipwright, or any other artificer, is entitled to review his work, and say, 'I have done work worth so much; true I have contracted to do other work, but it is not reasonable I should do it as I have not been paid, and in respect of work I have done I claim payment'."

We agree with the learned judge that this case is of no assistance to the appellants. In *The Tergeste*[8] there were no express provisions on progress payments. In the present case, there is express provision for payments of specific sums at specific dates or events. Both parties are bound by the express terms of their contract and we do not see how the appellants can bring a claim for the $500,000.00 until after September 1, 1986. This issue is in our opinion "hopeless" in so far as the appellants are concerned.

In the premises, we concluded that the appellants were entitled to security in respect of $169,552.30 (being the balance of their claim of $669,552.30 less $500,000.00) plus interest and costs. Accordingly, we allowed the appeal, set aside the order of the High Court, and reduced the amount of security furnished by the respondents to $230,000.00. We further ordered that the respondents pay the appellants half the costs of the appeal before us. As for costs of the hearing before the High Court, we were of the view that we ought not, in the circumstances, to interfere with the learned judge's decision that costs before him be costs in the cause.

Appeal allowed.

Solicitors: *Haridass, Ho & Partners; P. Suppiah & Co.*

RE APPLICATION BY DOW JONES (ASIA) INC.

[O.C.J. (Sinnathuray J.) November 26, 1987]

[Singapore – Originating Motion No. 33 of 1987]

Civil Procedure – Leave to apply for certiorari and ancillary relief – Application for – Whether procedure adopted a correct one – Status of R.S.C. 1970, O. 53 – Differences with English Order 53 – Notice of motion and statement amended – Affidavit amended.

Administrative Law – Leave to apply for certiorari and ancillary relief – Application for – Merits of application.

In this application, by way of a notice of motion, the applicants sought leave to apply for orders of certiorari and for certain other ancillary relief. The application was related to two decisions made by the Minister of Communications and Information. One of the decisions was the declaration by the Minister that the Asian Wall Street Journal was engaging in the domestic politics of Singapore. The other decision was the restriction of the sale of the Journal in Singapore to 400 copies until further notice.

The present application was purportedly made under Order 53 of the Rules of the Supreme Court 1970. Apart from objecting to the main action, the Attorney-General also raised a preliminary objection. He objected to the manner in which the present application was brought and contended that some of the relief sought in the present application could not be made under Order 53. The applicants, however, submitted that an Order 53 application was highly appropriate for the relief sought.

Held: (1) the English Order 53 is a very different creature from its predecessor and likewise from our Order 53;

(2) the position in Singapore is different from that of England. The procedure that applies for prerogative orders is based on the old English Order 53. There is no provision in our substantive law or rules of court relating to procedure for the court to make orders of declarations or give other ancillary reliefs in an application made under our Order 53;

(3) the notice of motion, the statement and the affidavit were amended. Leave was also given to file an amended notice of motion, an amended statement and a fresh affidavit;

(4) following the *dicta* in *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*,[1] leave should be given for the applicants to apply for certiorari;

(5) the *status quo* must remain and therefore the application for stay was refused.

Cases referred to:

(1) *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses* [1982] A.C. 617.

(2) *Alfred Dunhill Ltd.* v. *Sunoptic S.A.* [1979] F.S.R. 337.

ORIGINATING MOTION.

Louis Blom-Cooper Q.C. (*H.E. Cashin* with him) for the applicants.

Tan Boon Teik, Attorney-General (*Jeffrey Chan,* Deputy Senior State Counsel, with him) for the respondent.

Cur. Adv. Vult.

Sinnathuray J.: In this application made by way of notice of motion dated May 11, 1987 in originating motion no. 33 of 1987, the applicants, Dow Jones Publishing Co (Asia) Inc., ask for leave to apply for orders of certiorari and for ancillary relief to quash an order made by the Minister of Communications and Information under section 16 of the Newspaper and Printing Presses Act (Cap. 206) declaring the Asian Wall Street Journal to be engaging in domestic politics and a decision made by the Minister restricting the sale and distribution of the Asian Wall Street Journal in Singapore to 400 copies until further notice. The notice of motion states that the grounds are set out in two documents – the statement made pursuant to Order 53 rule 1(2) and the affidavit of Mr. Fred Lee Zimmerman, both filed on May 11, 1987.

Though it is not stated anywhere in the heading or in the body of the notice of motion commencing these proceedings under what rule of substantive law and/or procedure the application is made, it is clear from the documents filed in these proceedings, which I have referred to, that the application is made under Order 53 of the Rules of the Supreme Court 1970. It is necessary, therefore, that I refer to the relevant rules.

Under rule 1(1), no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. Rule 1(2) states that an application for such leave must be made *ex parte* to the court and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on. Rule 1(3) provides that the applicant must give notice of the application for leave not later than the preceding day to the Attorney-General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits. Under rule 1(4), the court or judge may, in granting leave, impose such terms as to costs and as to giving security as it or he thinks fit. And finally, under rule 1(5), the grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the court or judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders.

In this application, as I have said, there is a statement made pursuant to rule 1(2). It sets out under the heading "Relief Sought" the following:

(1) An order of certiorari to quash the declaration of February 9, 1987. This refers to the order made by the Minister declaring the Asian Wall Street Journal to be a newspaper engaging in the domestic politics of Singapore.

(2) An order of certiorari to quash the restriction order of February 9, 1987. This in turn refers to the decision of the Minister that the sale and distribution of the Asian Wall Street Journal in Singapore be restricted to 400 copies.

(3) A declaration that the Minister's order, gazetted on February 9, 1987, declaring the Asian Wall Street Journal "to be a newspaper engaging in the domestic politics of Singapore" within section 16(1) of the Newspaper & Printing Presses Act (Cap. 206) is invalid and of no legal effect.

(4) A declaration that the Minister's order, dated February 9, 1987, restricting the sale of the Asian Wall Street Journal to 400 copies a day, pursuant to section 16(4) of the Newspaper and Printing Presses Act (Cap. 206) is invalid and of no effect.

(5) A declaration that section 16 of the Newspaper & Printing Presses Act (Cap. 206) is inconsistent with Article 14 of the Constitution of Singapore and is by operation of Article 4 of the said Constitution void and of no effect.

On these reliefs on which the applicants ask for leave, in this hearing, the learned Attorney-General takes a preliminary procedural objection. It is submitted that the applicants are not entitled to seek orders for declarations in proceedings brought under Order 53. The short point he makes is that there is a fundamental error in bringing the application in the way it has been made and therefore the application is misconceived. He submits that either the applicants apply to put the matter right and, if not, that I dismiss this application. Mr. Blom-Cooper for the applicants can say no more than that an Order 53 application for certiorari is also highly appropriate for orders for declarations and for other ancillary reliefs.

Now, it is clear to me that our Order 53 is quite different from the present Order 53 of the Rules of the Supreme Court of England. The English Order 53 was introduced in 1977 and came into effect in 1978. It deals with "Application for Judicial Review" and it replaced the former Order 53. Our Order 53 was taken from that old English Order 53, as originally provided for in the 1965 Rules, and came into existence in our 1970 Rules.

On the submission on procedure, the best way I can explain the subject is to refer to one case, that of *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*[1] It is a weighty case of the House of Lords. The facts are not relevant for the present purpose. It is sufficient to say that the Federation representing the small businesses applied for judicial review under Order 53 rule 1 and claimed a declaration that the Inland Revenue had acted unlawfully in granting an amnesty to certain workers and an order of mandamus directed to the Inland Revenue to assess and collect income tax from those workers. It appears in the head-notes that the Divisional Court granted leave *ex parte*, but at the hearing *inter partes*, on the Inland Revenue's objection that the Federation had no *locus standi*, the Divisional Court held that the Federation had not "sufficient interest" within Order 53 rule 3(5) to claim the declaration and order sought. On the Federation's appeal which proceeded on the assumption that the Inland Revenue had no power to grant such a tax "amnesty", the Court of Appeal allowed the appeal holding that the body of taxpayers represented by the Federation could reasonably assert that they had a genuine grievance. It was against that decision that the Inland Revenue appealed to the House of Lords. The question at issue in this appeal was whether the respondents had a "sufficient interest" within the meaning of Order 53 rule 3(5) to apply for judicial review.

First, I take the speech of Lord Diplock. At p. 636, he said that the "appeal provides the House with its first occasion to consider what changes, if any, to public law in England have been made by the new R.S.C. Order 53 which came into effect on January 11, 1978, and provides for applications for judicial review of the legality of action or inaction by persons or bodies exercising governmental powers." At p. 637, he pointed out that rules of court "are concerned with procedure and practice only; they cannot alter substantive law, nor can they extend the jurisdiction of the High Court. In the same page, he said:

> "Before the new Order 53 was substituted for its predecessor, the private citizen who sought redress against a person or authority for acting unlawfully or *ultra vires* in the purported exercise of statutory powers had to choose from a number of different procedures that which was the most appropriate to furnish him the redress that he sought. The major differences in procedure, including *locus standi* to apply for the relief sought, were between the remedies by way of declaration or injunction obtainable by a civil action brought to enforce public law and the remedies by way of the prerogative orders of mandamus, prohibition or certiorari which lay in public law alone ...
>
> Your Lordships can take judicial notice of the fact that the main purpose of the new Order 53 was to sweep away these procedural differences ... to substitute for them a single simplified procedure for obtaining all forms of relief ..."

And at p. 639, he said:

> "In my view the language of rule 1(2) and rule 3 of the new Order 53 shows an intention that upon an application for judicial review the court should have jurisdiction to grant a declaration or an injunction as an alternative to making one of the prerogative orders, whenever in its discretion it thinks that it is just and convenient to do so ... so if, before the new Order 53 came into force, the court would have had jurisdiction to grant to the applicant any of the prerogative orders it may now grant him a declaration or injunction instead ..."

Next, I refer to the speech of Lord Roskill. At p. 656, he summarized Order 53 rule 1:

> "... Order 53 was introduced into the Rules of the Supreme Court in 1977. For ease of reference I set out the most relevant parts of certain of the rules of that Order.
>
> '1.(1) An application for (a) an order of mandamus, prohibition or certiorari ... shall be made by way of an application for judicial review in accordance with the provisions of this Order. (2) An application for a declaration or an injunction ... may be made by way of an application for judicial review, and on such an application the court may

grant the declaration or injunction claimed if it considers that' (and that there are a number of circumstances set out which I do not think I need read them today)

'2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter. 3.(1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule. (2) An application for leave must be made *ex parte* ... (5) The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates'."

He then said:

"I would make these comments upon Order 53 at this juncture. First, the changes thereby effected, though seemingly changes in procedure and thus made as part of the Rules of the Supreme Court, were and were intended to be far-reaching ... All relevant relief could be claimed under the general head of 'judicial review', and the form of judicial review sought or granted (if at all) was to be entirely flexible according to the needs of the particular case. The claims for relief could be cumulative or alternative under rule 2 as might be most appropriate.

Secondly, (I stress this particular case) relief by way of declaration, or injunction, was made a form of judicial review to be granted in an appropriate case having regard to the factors mentioned in rule 1(2)."

It is clear from the passages cited that the English Order 53 now is a very different creature from its predecessor and likewise from our Order 53. As I understand the position, this reform in procedure in England was validated by another great reform made to the substantive law. There are two sections in the Supreme Court Act 1981. Sub-section (1) of section 29 preserves the old prerogative orders. It reads as follows:

"(1) The High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act."

The other section 31 which has a marginal reference "Application for judicial review" is a new provision. Sub-section (1) of this lengthy section provides as follows:

"An application to the High Court for one or more of the following forms of relief, namely –

(a) an order of mandamus, prohibition or certiorari;

(b) a declaration or injunction under subsection (2); or

(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review."

The position in Singapore is different from that of England. As I have already said, the procedure that applies for prerogative orders is based on the old English Order 53. And, as regards substantive law, section 18(2) of the Supreme Court of Judicature Act (Cap. 322) just states in paragraph (a) that the High Court shall have the "power to issue to any person or authority directions, orders or writs, including writs of ... mandamus, prohibition ... and certiorari ... for the enforcement of any of the rights conferred by any written law or for any purpose". So, as I have sought to show, there is no provision in our substantive law or our rules of court relating to procedure for this court to make orders of declarations or give other ancillary reliefs in an application made under Order 53.

The orders I therefore make on the procedural issue before me are these. (a) As regards the notice of motion, the words "and ancillary relief" are struck out. (b) As regards the statement, under the heading "Relief Sought", paragraphs 3, 4 and 5 are struck out and consequentially any references in the statement to those reliefs must also be struck out. (c) As regards the affidavit, any references in the affidavit to the reliefs that have been struck out must be expunged or struck out and I shall have something more to say about the affidavit later. The applicants are at liberty to file an amended notice of motion and an amended statement and, if they so desire, to remove from the court file and file a new affidavit to comply with the orders made.

I now come to the matter concerning the affidavit that has been filed. Before I mention what it is, it is relevant to refer to Order 41 rule 5(1) which states the general rule that "an affidavit may contain only such facts as the deponent is able of his own knowledge to prove." There are exceptions to this general rule provided in the rules when affidavits "may contain statements of information or belief with the sources and grounds thereof". Rule 6 of Order 41 then provides that "the court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive". I have often in this court had to tell counsel that there must be compliance with the rules relating to the making of affidavits. Certainly, they must not contain submissions and contentions as the affidavit filed in these proceedings does. It seems to me that if affidavits were allowed to contain arguments there

will be no need for the assistance of counsel at the hearing in court. The point I make was also the subject of comment by Lord Justice Roskill (as he then was) in *Alfred Dunhill Ltd.* v. *Sunoptic SA*[2] at p. 352 thus:

"I hope it is not out of place to say at this stage that the affidavits filed on both sides are in at least two cases very much too long. Affidavits are designed to place facts, whether disputed or otherwise, before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not, as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments, especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of the deponents. There has been much unnecessary paper in this case brought about by the inclusion of legal arguments in affidavits."

So, once again, in giving leave to file, if necessary, a fresh affidavit, I would urge those responsible for drafting it to comply with Order 41 rule 5 and leave out of the affidavits matters relating to submissions and contentions which are for counsel to deal with at the hearing.

I now come to the main submission. The learned Attorney-General has opposed the granting of leave to apply for certiorari. He has raised complex arguments as to why leave should not be given. In one sentence, it is his submission that the order and the decision made by the Minister are not justiciable issues in the courts. Having regard to the decision I have come to, I do not propose to elaborate on the arguments or to deal with them at this hearing.

In giving the reason for the decision I have made, I refer again to the *National Federation*[1] case which I have found most helpful. Lord Wilberforce at p. 630 said:

"In the Divisional Court, when the motion for judicial review came before it, the point as to *locus standi* was treated as a preliminary point. 'Before we embark on the case itself,' said Lord Widgery C.J., 'we have to decide whether the federation has power to bring it at all.' After hearing argument, the court decided that it had not. The matter went to the Court of Appeal ... and again argument was concentrated on the preliminary point ... The Court of Appeal by majority reversed the Divisional Court and made a declaration that the applicants have a sufficient interest to apply for judicial review. On final appeal to this House, the two sides concurred in stating that the only ground for decision was whether the applicants have such sufficient interest.

I think that it is unfortunate that this course has been taken. There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context."

Lord Diplock made the same point at p. 643 when he said:

"... at the threshold stage, for the federation to make out a *prima facie* case of reasonable suspicion that the board in showing a discriminatory leniency to a substantial class of taxpayers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted what was in my view reason enough for the Divisional Court to consider that the federation or, for that matter, any taxpayer, had a sufficient interest to apply to have the question whether the board was acting *ultra vires* reviewed by the court. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

Finally, Lord Roskill said the same thing at p. 656:

"My Lords, your Lordships' House has often protested about the taking of short-cuts in legal proceedings ... The number of cases in which it is legitimate to take such short-cuts is small and in my opinion the present was not such a case. Indeed, many of the difficulties which were canvassed at length in arguments before your Lordships' House would have been avoided had this particular short-cut not been taken. With profound respect to the Divisional Court, this course was especially inappropriate where the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary, and the exercise of that discretion and the determination of the sufficiency or otherwise of the applicants' interest will depend, not upon one single factor – it is not simply a point of law to be determined in the abstract or upon assumed facts – but upon the due appraisal of many different factors revealed by the evidence produced by the parties, few if any of which will be able to be wholly isolated from the others."

With these speeches which I most respectfully agree, I am of the opinion that I should for the same reasons give leave in this case for the applicants to apply for certiorari subject to the orders and directions I have given.

There only remains the question of stay. Having regard to my decision that there is an arguable case as to whether the issues raised by the applicants are justiciable issues in the courts, I am of the view that the *status quo* must remain. The application for stay is refused.

The costs will be costs in the cause.

Order accordingly.

Solicitors: *Murphy & Dunbar.*

LIM KIM LIAN v. SWEE ENG HENG & ANOR.

[O.C.J. (Chao Hick Tin J.C.) October 16 & 17 and November 17, 1987]

[Singapore – Originating Summons No. 1009 of 1987]

Land Law – Conveyancing – Agreement of sale and purchase – Property affected by road plans – Whether requisition unsatisfactory – Whether can rescind agreement – Clause in option given the plain interpretation.

The defendants, in consideration of a payment of $3,450, made an offer by way of an option to sell to the plaintiff or his nominee the property in question. The offer was duly accepted by the plaintiff by the payment of 10% of the purchase price less $3,450.

One of the terms of the option was as follows: "8. The sale and purchase herein shall be subject to your solicitors receiving satisfactory replies to their legal requisitions and applications for interpretation plans to various government departments and Mass Rapid Transit Corporation and if any of such replies and/or interpretation plans are found to be unsatisfactory or if the above property is affected or may be affected by the Mass Rapid Transit system or any roadline or any road or drainage proposal or government acquisition or scheme or intended government acquisition or scheme then this Agreement may be rescinded at your option and in such event, I/we shall forthwith refund to you all monies paid by you to me/us or my/our solicitors but without any interest compensation or deductions whatsoever and thereupon neither party shall then have any claim or demand against the other for costs damages compensation or otherwise ..."

Through requisitions made, the solicitors for the plaintiff discovered that the property was affected by a roadline. The area that was affected by the roadline was 29.6 sq metres, *i.e.* almost 14% of the whole area.

The plaintiff, in the exercise of the right under clause 8 of the option, rescinded the agreement to purchase and asked for a refund of the 10% deposit. The defendants denied that the plaintiff was entitled to rescind and sought to forfeit the deposit.

The question before the court was whether, based on these facts, the plaintiff was entitled to rescind the agreement and have a refund of the 10% deposit.

Held: (1) the present property was affected by a roadline to the extent of 14%. That by no stretch of imagination could be considered to be inconsequential. The plaintiff would not have obtained what he wanted if 14% of the total land area would sometime in the future be taken away from him for road-widening purposes. Therefore the reply and/or interpretation plan was not satisfactory. The plaintiff was entitled to rescind;

(2) alternatively, the plain meaning of the second part of clause 8 should be applied. The court should give effect to the intention of the parties as expressed in the option and not rewrite it. Thus, on the alternative ground, the plaintiff was entitled to rescind the agreement.

Cases referred to:

(1) *Tatlien Hardware Pte. Ltd.* v. *Tan & Lie & Anor.* [1982] 1 M.L.J. 9.
(2) *Teo Hong Choo* v. *Chin Kiang Industries Pte. Ltd.* [1983] 2 M.L.J. 309.
(3) *Peh Kwee Yong* v. *Sinar Co. (Pte.) Ltd.* [1984] 2 M.L.J. 260.
(4) *Chu Yik Man* v. *S. Rajagopal & Co. & Anor.* [1987] 2 M.L.J. 557.
(5) *Re Meredith, ex parte Chick* (1879) 11 Ch.D. 731.

ORIGINATING SUMMONS.

V.K. Rajah for the plaintiff.
Lee Mun Hooi for the defendants.

Cur. Adv. Vult.

Chao Hick Tin J.C.: The plaintiff instituted this originating summons pursuant to section 4 of the Conveyancing and Law of Property Act (Cap. 61) for a declaration that the agreement for sale and purchase, constituted by the option dated July 10, 1987 whereby the defendants offered to sell the property known as No. 85 Jalan Gembira, Singapore 1336, and the acceptance of the offer by the plaintiff on July 23, 1987, was lawfully rescinded by the plaintiff in accordance with the terms of the option on the ground that the property in question was affected by a roadline. The plaintiff also asked for an order that the defendants be required to return the 10% deposit. At the conclusion of the hearing of the summons, I made the orders prayed for and I now give my reasons.

The undisputed facts of the case are these. On July 10, 1987, the defendants, in consideration